

**United States Bankruptcy Court
Northern District of Illinois
Eastern Division**

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**Bankruptcy Caption: In re HANDY ANDY HOME IMPROVEMENT
CENTERS**

Bankruptcy No. 95 B 21655

Adversary Caption:

Adversary No.

Date of Issuance: AUGUST 26, 1998

Judge: JUDGE ERWIN I. KATZ

Appearance of Counsel:

Attorney for Movant or Plaintiff: THOMAS J. LEANSE

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**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

.....)	
In re:)	Chapter 11
)	
HANDY ANDY HOME IMPROVEMENT)	95 B 21655
CENTERS, INC.,)	
)	
Debtor.)	Hon. Erwin I. Katz
.....)	

MEMORANDUM OPINION

This matter is before the Court on the Official Bank Creditors' Committee of Handy Andy Improvement Centers, Inc.'s (the "Committee") Motion for Summary Judgment on the claim of Forest City Enterprises, Inc. ("Forest City")¹. For the reasons set forth herein, the Court hereby grants the motion.

Background

On October 12, 1995, certain creditors filed an involuntary petition against Handy Andy Improvement Centers, Inc. ("Handy Andy"). Handy Andy then consented to the entry of an order for relief under Chapter 11 on November 1, 1995 (the "Order for Relief Date") and became a debtor-in-possession. A liquidating Plan dated June 28, 1996 was confirmed on August 12, 1996. Prior to the commencement of this case, Handy Andy and Forest City entered into a commercial sublease ("the Sublease") for seventeen (17) stores located in Ohio and Michigan. Twelve of the stores were owned by entities related to Forest City (the "Owned Stores") and the remaining

¹ It is unclear why the Committee filed a motion for summary judgment in response to Forest City's Motion to Compel as opposed to simply filing an objection to the Motion to Compel. In any event, the two motions raise the same issues and the granting of either motion will effectively require the denial of the other motion.

stores were owned by unrelated entities (the “Leased Stores”). The Leased Stores were located in (i) Livonia, Michigan, (ii) Roseville, Michigan, (iii) Taylor, Michigan, (iv) Bedford Heights, Ohio and (v) North Olmstead, Ohio.

The Sublease provided that Handy Andy would pay all general ad valorem real estate taxes assessed during the term of the Sublease with respect to the Owned Stores after the delivery to Handy Andy of a bill from the taxing authority at least (15) days prior to the due date of such taxes. Furthermore, Handy Andy agreed to pay real estate taxes relating to the five Leased Stores as set forth in the primary leases relating to those stores.

Handy Andy received tax bills pursuant to the Sublease during the period between the Order for Relief Date and the Sublease rejection date of June 15, 1996. On March 20, 1996, Forest City filed a Motion to Compel the immediate priority payment of real estate taxes and certain other amounts that became due postpetition pursuant to 11 U.S.C. § 365(d)(3). Handy Andy objected to Forest City’s Motion to Compel. Pursuant to two previously Court approved settlements, Forest City has received payment in full for its claims with the exception of taxes for prepetition periods that were billed and due postpetition².

The Committee filed the instant Motion for Summary Judgment requesting the denial of Forest City’s Motion to Compel payment pursuant to § 365(d)(3) because, based on this Court’s prior ruling (and the affirming decisions of the District Court and the Seventh Circuit Court of Appeals³), taxes that accrue prepetition but are billed postpetition and prior to the rejection of the

² The term “postpetition” hereafter refers to the period after the Order for Relief Date.

³ National Terminal Corp. v. Handy Andy Home Imp Ctrs., Inc., 196 B.R. 87 (Bankr. N. D. Ill. 1996) (J. Katz), aff’d, 222 B.R. 149 (N.D. Ill. 1997) (J. Williams), aff’d, 144

Lease are not entitled to priority payment pursuant to § 365(d)(3). Furthermore, the Committee asserts that Forest City is not entitled to payment of such taxes on a nonpriority basis because it had been paid in full for all of its claims except those allowed pursuant to § 365(d)(3). Forest City responds that the plain language of the Sublease, the plain meaning of § 365(d)(3) and the legislative history of § 365(d)(3) do require the payment of these taxes under § 365(d)(3). Additionally, Forest City argues the unique language of the Sublease distinguishes this case from this Court's prior decision on the same issue.

DISCUSSION

A motion for summary judgment is to be granted where “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact, and that the moving party is entitled to a judgment as a matter of law.” See Fed. R. Bankr. P. 7056 (incorporating Fed. R. Civ. P. 56). This initial burden rests with the moving party, and, once it has been carried, the burden shifts to the nonmoving party to “set forth specific facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e); see Celotex Corp. v. Catrett, 477 U.S. 317, 323-25 (1986). To show that no genuine issue sufficient to require a trial exists, the nonmovant must demonstrate that adequate evidence exists to allow a reasonable fact-finder to return a verdict in that party's favor. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49. The Court must evaluate the admissible evidence and inferences therefrom in the light most favorable to the nonmoving party. See id. at 255; Liberles v. County of Cook, 709 F.2d 1122, 1129 (7th Cir. 1983).

The Seventh Circuit in affirming the decisions of this Court and the District Court held,

F.3d 1125 (7th Cir. 1998) (C.J. Posner).

that where the debtor is clearly obligated to pay the real estate taxes, the debtor's obligation to pay such taxes pursuant to § 365(d)(3) does not extend to those taxes that accrued during the prepetition period regardless of the billing date. See In re Handy Andy, 144 F.3d 1125, 1127 (7th Cir. 1998). The Court found this interpretation more sensible than the landlord's "billing date" approach because it tracks the purpose of giving postpetition creditors high priority status. Id. The Court stated:

[S]ince death and taxes are inevitable and [the Debtor's] obligation under the lease to pay the taxes was clear, that obligation could realistically be said to have arisen piecemeal every day of [the tax year] and to have become fixed irrevocably when, the last day of the year having come and gone, the lease was still in force. . . . The obligation thus arose, in a perfectly good sense, before the bankruptcy. . . .

. . .

[The Debtor's] debt to [the landlord] for . . . taxes relates entirely to an earlier period, and is thus no different from its debts to trade creditors for supplies that it bought in [the period] but never paid for. . . . This shows that past taxes really are sunk costs, and shouldn't affect the current operations of a bankrupt tenant; and so the obligation to pay or reimburse the taxes that accrued prepetition is a pre rather than postpetition obligation.

Id. at 1127-28. The only exception would be if the language of the lease explicitly expresses the intent of the parties to alter the obligation. See National Terminals Corp. v. Handy Andy Improvement Ctrs., Inc., 222 B.R. 149, 156-57 (N.D. Ill. 1997), aff'd 144 F.3d 1125 (7th Cir. 1998). The prior opinions, therefore, control.

The language of the Sublease and the prime leases with the Leased Stores do not explicitly show that the parties intended real estate taxes not to be prorated for the purposes of § 365(d)(3). Further, the Court has reviewed the Revenue Acts of Michigan and Ohio, the states of the leased stores. (See Tax Dates Table attached as Addendum). They are substantially similar to Illinois' law as to the accrual issue. Thus, as the Seventh Circuit concluded for Illinois real

estate taxes that accrued prepetition, it can reasonably be said that the taxes in this case arose piecemeal over the course of the year. Therefore, Handy Andy is only obligated under § 365(d)(3) to timely pay the prorated portion of postpetition, prerejection real estate taxes that were assessed against the properties. The prorated portion of real estate taxes that accrued prepetition but were billed postpetition is a prepetition claim to be treated as such under the Plan. Accordingly, the Court grants the Committee's Motion for Summary Judgment denying Forest City's Motion to obtain immediate priority payment of real estate taxes that accrued prepetition but were billed postpetition. The Court also denies the Forest City' Motion to Compel the immediate priority payment pursuant to 11 U.S.C. § 365(d)(3) of real estate taxes that were billed postpetition.

Committee Counsel is directed to submit a judgment order in accordance with this Memorandum Opinion on September 8, 1998, at 10:30 a.m. on notice to the creditor, Forest City.

ENTERED:

ERWIN I. KATZ
United States Bankruptcy Judge

Dated: August 24, 1999

ADDENDUM

TAX DATES TABLE

	Tax Lien Date	Tax Assessment date	Billing Date	Tax Due date
Illinois	January 1, of the year in which the taxes are assessed		billed the following year.	payable the following year.
Ohio	January 1 of tax year (R.C. 323.11)	October 1 of tax year (R.C. 319.28)	December 11, of tax year (R.C. 323.11)	December 31 of tax year (R.C. 323.11)
Michigan	Usually December 31 of the preceding tax year (M.C.L. 211.40 & 40(a))		Usually December 1 of tax year (M.C.L. 211.40) depending on the taxing unit	payable on December 1 of the tax year depending on the taxing unit (M.C.L. 211.40)

ILLINOIS

Real property taxes are assessed on a calendar year basis but are billed and payable the following year. 35 ILCS 200/1-155; 35 ILCS 200/21-30. Unpaid taxes become a lien on the property as of January 1, of the year in which the taxes are assessed. 35 ILCS 200/21-75.

OHIO

Real property taxes are assessed on a calendar year basis. Taxes are not required to be calculated until October 1 in each year (R.C. 319.28), they must be billed by December 11 of that year (R.C. 323.11), the first one-half taxes are payable without penalty on December 31 of that year (R.C. 323.12) and the remaining half on or before the twentieth day of June next ensuing year (R.C. 323.12). Yet, under R.C. 323.11, they become a lien on the property on January 1 in each year.

MICHIGAN

Real property taxes are assessed on a calendar year basis. All real property in the State of Michigan is given a taxable status as of December 31, of the preceding year, the day designated as the "tax day." M.C.L. § 211.2. The amounts assessed on any interest in real property shall usually become a lien on tax day, December 31 of the preceding year. M.C.L. §§ 211.40 & 211.40(a). Subsequent to this tax day the land takes on a new characteristic, that of carrying a tax liability which will become due and payable (but not delinquent) on the levy date, December 1 of the tax year depending upon the taxing unit. M.C.L. § 211.40.